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October 15, 2010

Jennifer Sincock
U.S. Environmental Protection Agency
Region 3, Water Protection Division (3WP30)
1650 Arch Street
Philadelphia, PA 19103

Re: Docket ID No. EPA-R03-OW-2010-0736
Request for an extension of the public comment period for the
proposed Chesapeake Bay TMDL

Dear Ms. Sincock:

On behalf of the National Association of Homebuilders (NAHB), I respectfully request that the U.S. Environmental Protection Agency (EPA) extend the public comment period for the Draft Total Maximum Daily Load (TMDL) for the Chesapeake Bay, the availability of which was announced in the Federal Register on September 22, 2010, for an additional 180 days. This additional time is needed because of the technical complexity of the proposal and the need to afford all impacted parties an opportunity to fully understand and provide meaningful comments. It is also needed so that EPA can make all of the supporting documents available for review.

NAHB is a trade association representing more than 175,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with over 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the new housing projected for 2010. Because of the nature of their work, most of our members must obtain and operate pursuant to National Pollutant Discharge Elimination System (NPDES) permits for controlling the stormwater discharges stemming from their construction activities. The Chesapeake Bay TMDL's requirements will become a part of the stormwater permits issued for homebuilding projects in the Bay watershed.

The Chesapeake Bay TMDL is a very complex, innovative and far-reaching new rule. Because of the impact the TMDL will have on the home building industry, communities, and the overall region, it is imperative that it be finalized only after all parties are provided sufficient opportunity to give careful thought and consideration to all aspects of the proposal and its supporting documents. EPA's efforts to accelerate the TMDL's completion by cutting a most important element in the development of the Bay restoration program – the public review and comment period – is misguided and wrong. Contrary to this approach, the Agency is strongly urged to provide the public more, not less time. NAHB believes that EPA should extend the comment period for a minimum of 180 additional days.

A Complex Proposal Demands Sufficient Review

EPA acknowledges that the Chesapeake Bay TMDL will be the largest, most complex TMDL in the country, and it will be held up to the nation as the bar to meet for the future nutrient reduction programs that will take place around the U.S.; yet EPA is, at the same time, proposing to short shrift the public by limiting its ability to study the proposal and offer comment. Indeed, EPA has asked the public to review and comment on the lengthy proposal and supporting documentation including state Watershed Implementation Plans, a highly-technical pollutant reduction model, land use assumptions, and 22 appendices. Appendix B alone includes a list of documents supporting the Chesapeake Bay TMDL that spans 16 pages – all of which should be analyzed and understood before making comment. Taken together, the sheer volume of information amounts to thousands of pages that cannot realistically be reviewed and analyzed within the given 45-day comment period. Moreover, because the proposal raises many legal and policy issues, careful consideration and research will be needed before suggested solutions can be drafted.

While the Administrative Procedure Act (APA) does not specify a minimum time period for comment on a proposed rule, Executive Order (EO) No. 12866 provides that most rulemakings “should include a comment period of not less than 60 days.”¹ Likewise, for most TMDLs, EPA and the states provide a minimum of 60-90 days for public input. For example, EPA recently provided a public comment period of 60 days for the Accotink Creek TMDL in Virginia in the summer of 2010. Accotink Creek represents only one TMDL, vs. the 94 segments, or individual TMDLs, that make up the overall Chesapeake Bay TMDL. Following this example, it would be plausible that the Agency provide a 5,640 day comment period for the Chesapeake Bay TMDL (60 days per TMDL x 94 segments). NAHB is merely asking for additional 180 days.

Furthermore, when the Agency has offered insufficient time to review similarly complex and expansive rulemakings, EPA has recognized the mistake, extended

¹ Exec. Order 12866, 58 Fed. Reg. 51735 (September 30, 1993).

the comment period, and issued the complex rulemaking after due time for consideration. For example, EPA proposed 80 TMDLs in Louisiana and originally offered the public only 30 days for review and comment.² Not surprisingly, EPA received several requests to extend the comment period, so EPA agreed to accept comments for an additional 60 days.³ After reviewing comment from stakeholders who had additional time to review the data, EPA finalized the 80 TMDLs 7 months later.⁴

Finally, because EPA has plainly stated that the Chesapeake Bay TMDL will be used as a model for other waterbodies across the country, it is all the more important that the TMDL be accurate and fully vetted. A TMDL that cannot meet its intended goals serves no one. Allowing sufficient opportunity for the public to participate in forming the rule and providing input on the actions that can be taken to meet the goals will better ensure that the TMDL is not only practical and effective, but that it will be properly implemented.

The Technical Data and Cost Information Are Not Readily Available

In addition to proposing a TMDL that is highly complex and confusing, EPA has not made all of the supporting documentation available for review. As a result, it is impossible for the public to fully understand the Agency's reasoning or follow its justifications. For example, EPA has provided no technical data to justify the need for the urban stormwater requirements contained in the backstop allocations or to demonstrate that they will meet the desired outcomes. Likewise, information on costs or the best management practices that can be used to meet the urban stormwater requirements have not been made available. Other technical and cost data is similarly absent from the docket, as is any way to quickly understand how the proposal will affect the various industries, communities, or individuals within the watershed. If the public does not have access to these baseline datasets, it is unable to provide meaningful comment. Similarly, if the public cannot understand how the proposal will affect their interests or businesses, their ability to provide useful input is significantly hindered. EPA is obligated to make all supporting information and documents available to the public prior to the start of the public comment period and to provide sufficient opportunities for its thorough review. The existing docket and schedule fails to do so.

The Breadth of Impacts Warrants Broad Opportunities for Participation

The Bay TMDL will impose additional, extraordinarily difficult regulatory requirements on the home building industry and the citizens and communities located around the Bay. As such, it is imperative that the TMDL get a thorough examination not just by home builders, but by all stakeholders. Not only will a 45

² 71 Fed. Reg. 41217 (July 20, 2006) (setting August 21, 2006 as the original deadline for public comment).

³ 71 Fed. Reg. 59504 (Oct. 10, 2006) (agreeing to accept public comment until October 20, 2006, review the comments, and revise or modify the TMDLs as appropriate).

⁴ 72 Fed. Reg. 19,703 (Apr. 19, 2007).

day review period fail to provide sufficient time for the public to conduct a meaningful review or the develop insightful comments that would result from that review, for most stakeholders, the publication of the proposal is the first glimpse they have gotten into the sweeping breadth of the rule, the assumptions that EPA has made concerning their industries, and the many details that may affect their particular businesses and/or properties located within the Bay's watershed. Unlike other similar efforts, EPA has failed to include the public or the affected parties in developing the TMDL. While the Agency has held numerous meetings on the effort (outlined in Appendix V), very few have been targeted to those industries or stakeholders who will be impacted. For example, NAHB has been monitoring and participating in EPA's activities since 2009 (the overall regulatory effort began in 2008) and that was only after NAHB conducted significant due diligence and convinced the Agency to allow us to participate. In the technical meetings that NAHB has attended leading up to the proposal and on the technical conference calls in which we have listened in; we cannot recall a single representative of another industry at any of those meetings or on any of the calls. This represents a significant flaw in the Agency's process.

As a result of this failure to communicate or allow broad participation, the vast majority of industrial sectors that will be impacted by the TMDL have only just become aware of the coming rule and the potential severity of its requirements. The public meetings that EPA is currently holding may help in this regard, but many stakeholders will need more than the allotted 45 day comment period to fully understand the proposal and provide adequate technical comments on the draft rule. Indeed, EPA states that the goal of these meetings is "to assist the public in their understanding of the Draft Bay TMDL and provide an overview of the TMDL process, *especially the stakeholder review and comment process.*"⁵ For stakeholders in Romney, West Virginia who are hoping to use their November 4 public meeting as an opportunity to be introduced to EPA's effort, their public comment period has effectively been reduced to 4 days (two if one only counts business days).

Only people who work in the affected industries can possibly know in full how the proposed rule will impact their operations and how their portion(s) of the rule will work in the real world. Therefore, their review and comment is absolutely necessary to fine tune the requirements and ensure the proper balance between environmental stewardship and the economic impacts is made. In order to ensure that these entities can make their voices heard, EPA must extend the comment period.

EPA Retains Authority to Revise the Timeline/Allow a Longer Comment Period
EPA continually points to the TMDL schedule included in its May 2010 settlement with former Maryland state senator C. Bernard Fowler, the Chesapeake

⁵ 75 Fed. Reg. 5776 (September 22, 2010) (emphasis added).

Bay Foundation, Maryland and Virginia watermen's associations, and others in *Fowler v. EPA* that calls for the completion of the Bay TMDL by December 31, 2010 as the reason for a truncated public review. The Agency, however, has full authority to revise the schedule and timeline to allow for a sufficient comment period. Indeed, because the current deadline is simply an agreed-to date within a court settlement, EPA can renegotiate.⁶ In fact, the Settlement Agreement gives EPA flexibility to extend the December 31 deadline and certainly does not limit or modify EPA's discretion to allow the public sufficient time to review and comment on the 94 Bay TMDLs.⁷ Because the very purpose of the public comment process is to allow stakeholders to analyze the proposal and provide comments and suggestions that may improve the effectiveness and lower the costs of the rule, providing additional time for this vital and necessary input provides benefits to both the Agency and the public.

It is only fair that the public be given ample time and opportunity to participate in the development and finalization of this important and sweeping proposal. The Chinese saying: "Find enlightenment through heeding many points of view. Find ignorance through heeding few" is one EPA should follow. EPA needs to give stakeholders the broadest opportunity possible for them to fully understand and make their suggestions on the proposed rule. The best way to do that is to provide a minimum of 180 additional days for the public comment period for the proposed Bay TMDL.

Thank you for your consideration of this request. Please feel free to contact me at 202-266-8662 or grountree@nahb.org.

Cordially,



Glynn Rountree
Environmental Policy Analyst

⁶ *Fowler v. EPA* Settlement Agreement, Section IV.A. ("[t]he parties may modify any deadline or other term of this agreement in writing.").

⁷ *Fowler v. EPA* Settlement Agreement, Sections VI.A, D, & E. (noting that the agreement does not limit or modify EPA's discretion under the APA or require EPA to violate the APA, and allowing EPA to delay deadlines under certain circumstances upon notice to the plaintiffs).